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Supreme Court of Texas.

Louis M. Ditta, Guardian of the Estate of Doris L. Conte, an  
incapacitated  
person, Petitioner,

v.

Susan C. Conte and Joseph P. Conte, Jr., Respondents.  
No. 07-1026.

January 13, 2009.

Appearances:

Thomas C. Wright, Wright, Brown & Close, Houston, TX, for  
petitioner.

Karen L. Watkins, McGinnis, Lochridge & Kilgore, Austin, TX, for  
respondents.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht,  
Justice Harriet O'Neill, Justice Dale Wainwright, Justice Scott A.  
Brister, Justice David M. Medina, Justice Paul W. Green, Justice Phil  
Johnson, Justice Don R. Willett.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear  
our argument in 07-1026, Ditta v Conte.

MARSHALL: May it please the Court, Mr. Wright will present  
argument for the Petitioner. The Petitioner has reserved five minutes  
for rebuttal.

ORAL ARGUMENT OF THOMAS C. WRIGHT ON BEHALF OF THE PETITIONER

ATTORNEY THOMAS C. WRIGHT: Chief Justice Jefferson and may it  
please the Court, it has been said that a society will be judged by the  
manner in which it protects those who cannot protect themselves and  
this case is, in part, about that. I'd like to argue two reasons why  
the statute of limitations does not apply to this claim to remove a  
trustee and then get to, if we have time, why the Probate Court acted  
well within its discretion in removing Susan Conte as a trustee and in  
altering the Trust instrument. First of all, Section 16.001, clearly  
and without exception, provides that a person suffering under a  
disability, which includes a person of unsound mind, defined elsewhere  
in the Codes to be the same as an incapacitated person. Essentially,  
the limitations is tolled as to that person. We are advised by our

opponents that they believe this Court should engraft under that statute an exception for when a guardian is appointed and is serving. This Court has already dealt with that situation in the case cited in our briefs. It's a 1937 decision out of San Antonio, writ refused, however, by this Court, in which this Court held that because the claim and the note belonged to the ward, not the guardian, limitations did not run on a claim to enforce the note, despite the fact that a guardian was serving. That is the majority rule in the states and it ought to be adhered to by this Court. In fact, in Ruiz v. Conoco, and I regret the author is not here for me to compliment him on that great case.

MALE: He'll see the tape.

ATTORNEY THOMAS C. WRIGHT: Thank you. This Court went to great lengths to talk about the need to protect the incapacitated person, how they are much like children. In fact, in a worse condition than children because they cannot communicate and that is the situation we have here. In Ruiz, this Court cited many cases from other jurisdictions and ALR annotations that go on to say, in the Ruiz case the specific fact, which our opponents are trying to limit it to, said that while the fact that the incapacitated person himself had filed suit before he was found to be incapacitated doesn't matter. These other cases that Ruiz relies on also says the appointment of a guardian does not undo the tolling statute.

JUSTICE HARRIET O'NEILL: How do you deal with the \_\_\_\_\_.

JUSTICE MEDINA: What's this risk of harm, what's this risk of harm analysis? How does that apply here?

ATTORNEY THOMAS C. WRIGHT: Well, the risk of harm analysis and the legal injury rule is going to come into play only if this Court gets by 16.001 and our other main argument, which is limitations should never run against this kind of action. But to answer your question more directly, here there's this distinction made in the law between legal conduct and illegal conduct when it first happened. The money was taken, in this case, at a time before it was known what pot it was taken out of.

JUSTICE MEDINA: If it was a legal contact, how can the statute ever run? Legal conduct, rather.

ATTORNEY THOMAS C. WRIGHT: Well, all right, in, this is under the legal injury rule. If it's legal conduct, but then something else happens later that causes an injury, then the statute of limitations begins to run and one of the examples given in the case laws, if a bridge is built properly, but later because of the way the floodwaters came down and the timbers blocked and the river flooded, then that's when the injury happens and then you can bring suit. Now, you raise a good point. How can you sue somebody over legal conduct, but, you know, the cases are talking about the accrual of limitations and not, not the merits of the claim. Here I do think that, despite the extensive briefing on the legal injury rule, that the cleaner and simpler way for this Court to address limitations is through 16.001 and through looking at the Trust Code Provision 113.052 about removal of a trustee.

JUSTICE WAINWRIGHT: Mr. Wright, obviously the tolling for persons of unsound mind is give them an opportunity to protect their rights. When they're incapacitated, they have extreme difficulty or unable to protect their rights, so the statute is tolled until some point in time when they, the law deems they would be able to protect their rights. With the appointment of a guardian who has a fiduciary duty to look out for those rights, why does that not address the reason that there doesn't need to be tolling. Someone has a duty under the law now to

look after their best interests. What's, what's the best argument for, for disregarding the guardian position and moving forward and allowing the tolling to proceed anyway?

ATTORNEY THOMAS C. WRIGHT: Well, the best argument for many members of the Court is that the legislature has spoken and you shouldn't engraft an exception to what the legislature has clearly provided. But a reason beyond that is to say.

JUSTICE WAINWRIGHT: Well, the discovery rule is not necessarily stated in many limitations that are statutory as well. They're, I mean, that's, that doesn't answer the question. Maybe that's a partial answer. That doesn't answer the question though.

ATTORNEY THOMAS C. WRIGHT: Well, let me say this about the discovery rule. The statutes of limitations talk about the time from when a claim accrues. The discovery rule tells you when the claim accrues so it's not inconsistent with the statute.

CHIEF JUSTICE WALLACE B. JEFFERSON: Right.

ATTORNEY THOMAS C. WRIGHT: But to get on to my other point, if you're going to say there's an exception when a guardian is appointed, then you're going to need to define what kind of guardian you're talking about. We have many kinds of guardians--guardians ad litem, temporary guardians with limited powers, which is what happened in this case. Mr. Ditta did not have the power to bring suit until he was appointed permanent guardian and you're going to have to decide when limitations runs. Is it when the guardian is appointed or when they're qualified, but a bad reason, a reason not to do that is that you're going to increase the cost of guardianships and you're going to require the guardian, not just to protect the assets that he or she can see, but to go find, despite the fact that the ward cannot talk to them, to go investigate potential claims they might have against other people and bring those claims when they might never need to be brought or might not need to be brought at that time.

JUSTICE DON R. WILLETT: Mr. Wright, the briefs talk a lot, focus a lot on both sides about Ditta's knowledge, Ditta's actions. What does the record tell us about, about Doris' knowledge and action prior to '97 when she was deemed incapacitated, but any record evidence about whether this cause of action might have accrued via her own knowledge prior to the '97 decree of incapacitation.

ATTORNEY THOMAS C. WRIGHT: Well, there is nothing in the record about her capacity or incapacity, but there is evidence in the record that Susan continued to pay her own expenses out of this Trust after Mrs. Conte was declared incapacitated and so those, you know, when you take money at one point and you keep taking money over a period of years, you don't have just one limitation period.

JUSTICE DON R. WILLETT: But is there nothing about what Doris, herself, might have known prior to incapacitation?

ATTORNEY THOMAS C. WRIGHT: No, there is not in the record and I believe that that would be an irrelevant inquiry because what we're talking about here is a suit to remove a trustee from future service. Not to readdress what they've done in the past. The debts that are owed have been taken care of in the agreed judgment signed in January of 2001 in this case. What we're talking about is the future service of a trustee.

JUSTICE SCOTT A. BRISTER: Why is there any limitations period at all on that?

ATTORNEY THOMAS C. WRIGHT: I don't believe there should be and here's the reason. You're talking about...

JUSTICE SCOTT A. BRISTER: Let me make it clear.

ATTORNEY THOMAS C. WRIGHT: Okay, all right.

JUSTICE SCOTT A. BRISTER: Your suit is not for, you're not suing Susan or Joey or anybody for money back.

ATTORNEY THOMAS C. WRIGHT: Not in this claim, that's exactly right.

JUSTICE SCOTT A. BRISTER: The only claim is to remove somebody going forward?

ATTORNEY THOMAS C. WRIGHT: Correct, Your Honor.

JUSTICE SCOTT A. BRISTER: And, I mean, on a cloud on title, remove a cloud on title, there is no limitations period because it's a cloud on title and we've got to clear up real estate titles and it doesn't matter if the cloud's been there for 100 years, you can remove it. Why, is there any, has this Court ever said there's a limitations period for removing trustees?

ATTORNEY THOMAS C. WRIGHT: No, Your Honor, you have not.

JUSTICE SCOTT A. BRISTER: Are there any? I'm looking at Chapter 113. I can't find any limitations period.

ATTORNEY THOMAS C. WRIGHT: There is not and I would submit it would not make any sense to apply one and all the hypotheticals you can come up with about, you know, prior conduct could be presented to the trial court, who has discretion under that statute in terms of other equitable defenses, unclean hands, acquiescence, waiver estoppel. All of those things, you know, that when you start thinking about well, you shouldn't do this because of that, this is, you're exactly right. Limitations should not run against a claim that somebody should not serve in the future and especially when it's based on a status. Now I know this Court went into in a recent argument the difference between a breach of fiduciary duty and a conflict of interest and I want to point out to this Court why the trial judge had discretion to remove Mrs., Ms. Susan Conte as a trustee because of her conflict of interest.

CHIEF JUSTICE WALLACE B. JEFFERSON: I want to hear that, but can you, can you talk about Yancey for just a second and distinguish that here. That was an open court's challenge and we refused to allow an incapacitated person who's represented by a guardian to bring in additional parties beyond the limitations period.

ATTORNEY THOMAS C. WRIGHT: Yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: Why wouldn't that apply here?

ATTORNEY THOMAS C. WRIGHT: Well that's a, there's a specific statute that was a mcd-mal case. The mcd-mal statute takes away 16.001. It says regardless of any other statute, this is the limitation for this kind of claim.

CHIEF JUSTICE WALLACE B. JEFFERSON: But I think a major part of that opinion talked about the, as Justice Wainwright mentioned, the ability of the guardian to protect the incapacitated person's rights and why wouldn't that be applicable here?

ATTORNEY THOMAS C. WRIGHT: Well, again, because you're giving deference to the legislature and that's the main holding in Yancey is that you're not going to overturn this legislative judgment. There, the legislature deemed that having malpractice claims litigated quickly was more important than protecting the incapacitated, but elsewhere, including in this case, the legislature has said otherwise and I think this Court ought to defer to that.

JUSTICE DAVID M. MEDINA: Is there a continuing conflict since this mo-- has all this money been repaid or is there an agreement to pay it?

ATTORNEY THOMAS C. WRIGHT: The money has not been repaid. The judgment says that the.

JUSTICE DAVID M. MEDINA: If I need it, she'll pay it?

ATTORNEY THOMAS C. WRIGHT: Right, if needed, she'll pay it.

JUSTICE DAVID M. MEDINA: That seems (unintelligible) makes a lot of sense.

ATTORNEY THOMAS C. WRIGHT: Now here's the deal. She owes this money to the Trust, Susan does.

JUSTICE DAVID M. MEDINA: Who makes that determination if it's needed (unintelligible)?

ATTORNEY THOMAS C. WRIGHT: Well, the trustee does.

JUSTICE DAVID M. MEDINA: So that's a continuing conflict.

ATTORNEY THOMAS C. WRIGHT: That's a continuing conflict and when I say she owes the money to the Trust, which is what the judgment says, that's shorthand. As this Court knows, a Trust is not an entity. It's a relationship. So she, in fact, does not owe money to the Trust. She owes money to the trustee and that's the position she wishes to have is trustee and better to the trustee and there's a third position she has, which no one has challenged, but it goes into this conflict and that is she is guardian of the person of Doris Conte, who is charged with figuring out what money is needed to provide for the support, the medical care, the food and so forth of her mother and so she would be in a position if she were trustee not only to be deciding how much money is needed, but as Trustee to decide whether to collect that money from herself, individually. That is an ongoing conflict and at that conflict is a conflict she created. In *Slay v. Burnett Trust*, this Court said a fiduciary should not put themselves in a position where their interest conflicts with a beneficiary's. Now there are some circumstances in which you have an automatic conflict of interest. In fact, in this case when the Trust makes, the trustees are also beneficiaries, there's some conflict of interest. So it's not that, that conflict that would disqualify somebody, but it's what happens next. Do you violate your fiduciary duty? After all, the fiduciary duty we're talking about is the duty of loyalty and that is to put the interest of the other person ahead of yourself, your own interests. Well that assumes you have an interest. But here, not only did she not put the interest of her mother ahead of herself, she paid expenses out of the Trust, thereby creating, breaching her duty and then creating a conflict of interest when she agreed to this judgment that said she owed this money, but it would not be repaid until the trustee determined it was necessary and there is a finding in this judgment and the finding's of fact that the Trust is financially strapped. It doesn't say it that way. It's, cash poor and that's what Judge Austin found and that has not been challenged.

JUSTICE DAVID M. MEDINA: Well what would be the (unintelligible), what would be the benefit of, of someone in that situation to continue to perform as a trustee. There doesn't seem to be any financial gain involved.

ATTORNEY THOMAS C. WRIGHT: It may be a matter of control. It may be a matter of family ideas or whatever. I, I don't know exactly what is behind Susan's desire to be the trustee, but the individual trustee under the Trust is not supposed to be compensated. So you're right.

JUSTICE HARRIET O'NEILL: Let me ask you, does the record reflect the nature of the personal expenditures that she put out on her own behalf?

ATTORNEY THOMAS C. WRIGHT: Yes. There are accountings in the record, they're voluminous. Phone bills, bills to stores, all sorts of, you know, too numerous to, to account for, but it's, it's as though, you know, it was, as though that's her own personal checking account and everything that came through was paid that way. Now I'm not saying

everything was, but the variety of things is, is quite broad.

JUSTICE DALE WAINWRIGHT: The amount of the debt, is it approximately \$500,000 for Susan, \$900,000 for Joey and then \$700,000 for a debt to a company that Joey and Susan owned jointly?

ATTORNEY THOMAS C. WRIGHT: Yes.

JUSTICE DALE WAINWRIGHT: It's about 2.1 million or so.

ATTORNEY THOMAS C. WRIGHT: That's right, if you add those debts, that's correct, Your Honor.

JUSTICE DON R. WILLETT: Mr. Wright, you agree that the relevant inquiry here is whether Doris was under a legal disability when the cause of action accrued. Right?

ATTORNEY THOMAS C. WRIGHT: Well, that's one of the inquiries. That's on 16.001.

JUSTICE DON R. WILLETT: Okay and looking at that, we can pick it up again in rebuttal, but the first report by Miller, which came out in '99, looked at years '93 through '99 and it talked about unauthorized distributions and all this other alleged misconduct. So I'm kind of just circling back to my earlier question was so if we're focused on her capacity and we're focused on when the cause of action accrued, the report goes all the way back four years before she was deemed incapacitated to '93. So, again, my question is from '93 to '97 when these alleged improper distributions were being made, does anything in the record demonstrate Doris' awareness or knowledge about that improper conduct during that span?

ATTORNEY THOMAS C. WRIGHT: No, but if I can answer your question, you've, you've got a faulty assumption...

JUSTICE DON R. WILLETT: What's that?

ATTORNEY THOMAS C. WRIGHT: Justice Willett. If you take a conversion action and somebody's converted \$100 a year for 10 years and then you sue, you don't get poured out altogether. You can go back four years. Each one of those conversions is a separate act. There is evidence in this record that Susan paid further expenses after a time when there was an agreed order finding Doris Conte incapacitated. So even if we don't get the whole 500,000, there's plenty of money after that and within limitations, in 2001, she agreed to the judgment which created this conflict of interest that is a separate ground for removal under the statute.

JUSTICE DON R. WILLETT: So even if she didn't know, the fact that these were sort of continuous, repeated over time.

ATTORNEY THOMAS C. WRIGHT: Yes, but they're separate events and different amounts. It's not like, I don't think it's like a continuous tort that relates back to the first (unintelligible).

JUSTICE DON R. WILLETT: Right, distinctly independent. I hear it.

ATTORNEY THOMAS C. WRIGHT: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you, Counselor. The Court will now hear from the Respondent.

MARSHALL: May it please the Court, Ms. Watkins will present the argument for Respondent.

ORAL ARGUMENT OF KAREN L. WATKINS ON BEHALF OF THE RESPONDENT

ATTORNEY KAREN L. WATKINS: May it please the Court. I find myself in the position needing to correct some of the things that my colleague has said about the record factually. First of all, Judge Willett, there is something in the record about Ms., Mrs. Conte's knowledge about the expenditures that Susan made.

JUSTICE DON R. WILLETT: What's that?

ATTORNEY KAREN L. WATKINS: Susan testified at the removal trial and this testimony was not impeached that her mother knew about her expenditures and that she never made any without her mother's approval. There is no contradictory testimony. There is also, Judge O'Neill, in response to your question, there is information in the record, the accountings and a report of Susan's due-to, due-from account that shows what expenditures were made, but that needs to be taken into account. Susan lived with her mother. So if there are utility payments, they are payments for the utilities that were for Mrs. Conte's dwelling.

JUSTICE HARRIET O'NEILL: Well, and, and let's take utility payments, for example, if she was living there with her, did the trial court find that there were expenditures on her account, on, on Susan's account that had to be paid back?

ATTORNEY KAREN L. WATKINS: There were no findings by the trial court on that matter. There was an Agreed Judgment and one of the things I want to correct from the briefing, Mr. Ditta says in his briefing that he did not agree to the arrangements to defer the payment of this debt. That's not right. He signed off approved on that Agreed Accounting Judgment and there are interlineations on the first and second pages that bear everyone's initials, including Mr. Ditta's. So, well we have a situation where the successor temporary trustee has been asserting that she made these expenditures out of Trust, you will not find anything in the Judgment resulting from that trial that indicates she made expenditures out of trust.

JUSTICE DAVID M. MEDINA: But, if there's an Agreed Judgment to repay certain amount, amounts of money, how is that not a continuing conflict on the Trust?

ATTORNEY KAREN L. WATKINS: Well, for one thing, Your Honor, how do I put this best? There's not a continuing conflict of interest because this is an Agreed Judgment. Mr. Ditta can't really complain that there's a conflict of interest because he agreed to the creation of this debt and its repayment, the terms of its repayment. One other thing that Mr. Wright said that I want to correct; the trustee does not determine when this debt is repaid. Anyone can go to the Probate Court and the Probate Judge decides when this needs to be repaid.

JUSTICE DAVID M. MEDINA: Who would go to the Probate Court to request that?

ATTORNEY KAREN L. WATKINS: Anybody who's an interested person, but since the primary beneficiary is Mrs. Conte, the person charged with protecting her financial interests should be the one who goes to the Probate Judge and asks for the repayment of this debt if the Trust is not liquid in cash. That has not been done. Mr. Ditta has not, never gone to the Probate Court and said the Trust is not liquid. We need this debt repaid so mom's bills can be paid.

JUSTICE DON R. WILLETT: Ms. Watkins, really quickly, looking at the record, if I wanted to nail down specific dates on which the alleged breaches occurred, where do you suggest the Court look?

ATTORNEY KAREN L. WATKINS: Well it's an interesting question, Judge Willett, because this is really not a breach of fiduciary duty case and I do take exception to what Mr. Wright said about there being expenditures after there was a Judgment declaring Ms. Conte incompetent. Ms. Conte was not declared incapacitated until 2001 and we filed some exhibits before the argument this morning and you can look at tab number one, which is the Agreed Order Appointing the Successor Temporary Trustee.

JUSTICE DON R. WILLETT: 2001, not in 1997?

ATTORNEY KAREN L. WATKINS: Not in 1997, Your Honor. She was, in fact, presumed competent until that Order appointing permanent guardians. I misspoke earlier, the tab one is the Order Appointing the Permanent Guardians of the Estate and of the Person and that came after the Accounting Judgment. So it was not until that point that Mrs. Conte was deemed incapacitated and, at that point, there had been a successor trustee for some time. Susan didn't have access to the money.

JUSTICE DON R. WILLETT: Let me get this straight. So the, the first report by Miller covered years '93 to '99, talked about unauthorized distributions and all the rest, but you're saying the incapacity determination came two years after that report.

ATTORNEY KAREN L. WATKINS: Yes, Your Honor, substantially later.

JUSTICE SCOTT A. BRISTER: Do you agree there's no, where is the statute of limitations for removal?

ATTORNEY KAREN L. WATKINS: Well, Your Honor, the first time I heard the notion that there should be no statute of limitations for removal action is when Your Honor posed that question to my opponent.

JUSTICE SCOTT A. BRISTER: That's not that unusual and there's no statute of limitations on divorce because it's a status and if a spouse has been abused for years and years, we don't stop, stop them saying, sorry, you waited too long to complain about abuse, no divorce. We do the same thing on cloud on title. We can't have two people owning title forever and so it doesn't matter if the cloud's been there for 100 years or not. It's a status of the property and we determine it here going forward and I'm wondering why there should be anything on, on removing a trustee. If a trustee's been stealing for 20 years and the beneficiaries knew about it, but it was mom or brother and so they didn't say anything, but they finally come up and say, you know, we need this trustee to stop stealing, please remove them. Why in the world would you want a statute of limitations say stop, you waited too long. We're going to let the abuse continue.

ATTORNEY KAREN L. WATKINS: Well there might not be a reason in this situation that the Court has hypothesized and so your question really touches on two things.

JUSTICE SCOTT A. BRISTER: But there's either a, there's an either of statute of limitations for removal or there's not and we've never said there is one right?

ATTORNEY KAREN L. WATKINS: Not as far as I can tell, Your Honor.

JUSTICE SCOTT A. BRISTER: Well, all the questions we're talking about today turn on that. If there's no Statute of Limitations, all these questions about was she incapacitated and who did what, when, it doesn't matter because all this is removal action right?

ATTORNEY KAREN L. WATKINS: That's right. It is removal action.

JUSTICE SCOTT A. BRISTER: So help me find out where there's a statute of limitations for removal.

ATTORNEY KAREN L. WATKINS: The parties tried this particular case agreeing that there was a statute of limitations for removal action. There is a seismic shift in the case if now my opponent is going to contend in response to your question, Your Honor, that there is no limitations provision that applies to your removal action at all.

JUSTICE SCOTT A. BRISTER: I thought that was a part of their brief. They said it's equitable action.

ATTORNEY KAREN L. WATKINS: Well, it's, it's really surprising that they would argue quite a bit about tolling if there's no limitations provision at all.

JUSTICE SCOTT A. BRISTER: People are assert---here's my position, but I lose that, here's my position.



ATTORNEY KAREN L. WATKINS: Right.

JUSTICE SCOTT A. BRISTER: If I lose that, here's my position.

ATTORNEY KAREN L. WATKINS: Well let me, let me explain to you why I believe there should be a limitations action in a case like this one. This is perhaps a perfect case for that old adage that a bad case makes bad law. The one case in which there really should be a limitations period for asserting a removal action is when you have a guardian of an incompetence estate. The guardian is, as Judge Jefferson pointed out, has a, or Judge Wainwright, I don't remember which.

MALE: Well it's Chief Justice Jefferson and Justice Wainwright.

ATTORNEY KAREN L. WATKINS: My apology, Judge Medina and Chief Justice Jefferson. There is a fiduciary responsibility on the part of a guardian to look out for the financial interests of his or her ward. So this is a case in which you have a person whose specific duty is to pay attention to and protect the financial interests of his ward in this Trust and he's come to you asking to, for you to excuse him from that responsibility.

JUSTICE SCOTT A. BRISTER: No he's come to, I mean, what if that, what if that person makes a mistake and they're supposed to be watching out for the lady who's incompetent and they know there's something going on for six years and don't do anything about it? Why should we punish the lady who's incompetent by saying, ooop, you didn't have a good guardian. He should have moved faster.

ATTORNEY KAREN L. WATKINS: Well you're not.

JUSTICE SCOTT A. BRISTER: She, her estate is drained. She didn't even pick the, the guardian. Some court did. Why should she pay the price?

ATTORNEY KAREN L. WATKINS: She shouldn't and unlike the situation in Ruiz, I also regret that Judge Hecht is not here today so that we could talk some more about Ruiz, but unlike the situation in Ruiz, you don't have a situation here where there's no remedy available to the ward. A guardian has to post a bond. If he makes a mistake and doesn't protect her as diligently as he should by asserting her rights when he should, she has a cause of action against him for what he's, what injury has resulted to the estate.

JUSTICE SCOTT A. BRISTER: So now if a trustee's been stealing and the guardian doesn't catch it, we can sue the guardian for it, but we can't remove the trustee? That's not a good idea is it?

ATTORNEY KAREN L. WATKINS: No, it's not a good idea.

JUSTICE SCOTT A. BRISTER: And we'll leave the trustee there forever if the trustee, in my hypothetical, no relation to this case, in my hypothetical, if the trustee's stealing, limitations run, we have to allow this, the thief to stay trustee forever because limitations has run.

ATTORNEY KAREN L. WATKINS: Well I would submit, Judge...

JUSTICE SCOTT A. BRISTER: You can't have that right.

ATTORNEY KAREN L. WATKINS: We can't have that. That's why we're...

JUSTICE SCOTT A. BRISTER: No matter how long the thieving's been going on, a court has to have the power to remove a thief as a trustee.

ATTORNEY KAREN L. WATKINS: Yes, Your Honor. I agree with that and the Court ought to adopt a rule that encourages people to watch for thievery. That's not even something that we're asking you to do with respect to Mr. Ditta. Mr. Ditta had a report delivered to him in 1999 in which the person charged with doing the accounting for the Trust said she's stealing. Now she wasn't and she never agreed that she was, but Mr. Ditta was put on notice, hey, there's something here I need to look at. You know, a lot of out-of-state cases on which Ruiz relies

have to do with the fact that the limitations period should be tolled for the duration of the incapacity because you want people to have the time to find out what's going on. This is not that case.

JUSTICE HARRIET O'NEILL: But why is it not that case if we were to adopt the majority rule? I don't, that's where I'm having a hard time getting my arms around this case because if we were to say that it's only when the incapacity is removed, then why isn't that when she dies?

ATTORNEY KAREN L. WATKINS: If the Court were to adopt the majority rule, certainly that would be the effect. But the other effect would be guardians would say, oh, well, you know, I can take the money for doing this job and I don't necessarily have to be diligent because if I don't find this thief in time, I can sue whenever I get around to suing.

JUSTICE HARRIET O'NEILL: But the same is true for parents isn't it? I mean.

ATTORNEY KAREN L. WATKINS: No, Your Honor, I don't think so because well, a parent-child relationship is also a status. A guardian is a person specifically selected by the Probate Court and charged with responsibility to protect this specific interest. That's also another way that the out-of-state cases that Ruiz relies on and that my opponent relies on are very different from this case. Those are all personal injury cases. So when Mr. Wright talks about a requirement to go out and find claims to be asserted, that's not an issue in this case. In this case, you have somebody who had a specific task he was supposed to carry out. He had somebody telling him everything he needed to know to assert the claim and he just didn't do it and if the Court were to use this case to adopt the majority rule, then guardians everywhere watching this are going to say they don't have to either.

JUSTICE DAVID M. MEDINA: Well Justice Hanks, in his opinion, wrote there was no evidence or there is no evidence of clean, unclean hands. I assume that's correct, but if there were. Would that make a difference?

ATTORNEY KAREN L. WATKINS: In the removal action, Your Honor?

JUSTICE DAVID M. MEDINA: In the tolling of the statute.

ATTORNEY KAREN L. WATKINS: In other words, if someone had tried to obstruct the flow of information to Mr. Ditta?

JUSTICE DAVID M. MEDINA: Right.

ATTORNEY KAREN L. WATKINS: Yes, I think it would have made a difference in terms of when he acquired the necessary knowledge to assert the claim, you know. If he were to say, for example, that Ms. Miller didn't provide him with the information or if Susan had somehow managed to hide these expenditures that she was making on behalf of her mother, then the case might have been very, very different, but that's not what we have. Everyone was very much above board in reporting what was going on. Susan didn't have a problem with reporting what was going on because she was doing what she was doing at her mother's direction. Judge Willett, another piece of information in the record about what mom knew is behind tab four in the handouts that I've provided the Court this morning. It's a Durable Power of Attorney that allows Susan to act on her behalf. It was signed in 1998 and it specifically provides that it will survive mom's incompetence if she becomes incompetent.

JUSTICE DON R. WILLETT: Quick question, there's the March '01 declaration of total, totally without mental capacity, but November of '97, four years earlier, there's the temporary guardianship proceeding. Is implicit in that not a determination that she's incapacitated?

ATTORNEY KAREN L. WATKINS: Actually, the law provided otherwise at the time, Your Honor, and that's why I've provided you the handout this

morning. Behind tab two is Section 875, I believe, of the Probate Court, which is the procedure for appointing a temporary guardian as it existed at the time that this temporary guardian was appointed. And sub-part B, which begins at the top of page 2 of that Provision specifically provides that a person for whom a temporary guardian has been appointed may not be presumed to be incapacitated. Now that law was changed in 2003, but the legislature specifically provided that it would remain in effect for applications for temporary guardianships that were filed before the date, the effective date of the revisions and that information from the legislature is behind tab number three.

JUSTICE DALE WAINWRIGHT: Does that statute preclude, however, a finding of incapacitation in '97? It just says you don't presume it right?

ATTORNEY KAREN L. WATKINS: It says you don't presume it and there was no such finding in this case. The first time we have a finding, I believe, of incapacity is in the March '01 Order.

JUSTICE DALE WAINWRIGHT: The Temporary Guardianship Order does say that the Order of the Court is that they should arrange for a proposed ward to have proper care and nutrition. It sounds like someone who can't take care of herself. Was she in about her mid-70's at this time?

ATTORNEY KAREN L. WATKINS: To tell you the truth, Your Honor, I don't know how old Mrs. Conte was at that time?

JUSTICE DALE WAINWRIGHT: And it says that further in the Order that the guardian, temporary guardian, should collect all income and pay all expenditures necessary for the care of the proposed ward. It, it certainly makes it sound like that's a person who can't take care of themselves properly. It doesn't say mentally as well as physically or financially, but it's suggesting certainly physical care and financial care and it doesn't say, at least in the part that I'm looking at, that she was mentally of unsound mind. We can't infer that there was a concern about her legal capacity based on the appointment of a temporary guardian.

ATTORNEY KAREN L. WATKINS: I think, I think we...

JUSTICE DALE WAINWRIGHT: Or take that as an indication that there was?

ATTORNEY KAREN L. WATKINS: I certainly think we can conclude, Your Honor, that there was some concern about her ability to handle her own affairs. If there weren't, if you look at the first subsection of section 875, if there were no concern, no temporary guardian could have been appointed. The Court has to have some evidence that a person needs help before a temporary guardian can be appointed. That's not the same thing as making a determined, a determination on that initial presentation that she's incapacitated. What I would say is probably the most important thing about this case is the strange alignment of the parties. I think the adoption of a rule of limitations in a situation where you have a guardian of the estate of an incompetent person who has a financial interest in a trust, who like Ms. Conte is the primary beneficiary in a Trust, the adoption of such a rule is going to do the most to protect the ward because the sooner we find out that there's a thief or that there's a trustee who's self-dealing or any of the things that are bad for trustees to do, the sooner you find out about it, the better it is for the ward. Requiring someone who's assumed a fiduciary responsibility to look out for the financial interests of that ward, to do it diligently is a good thing.

JUSTICE DAVID M. MEDINA: What do you propose? Do you have an Order for us to sign? That's.

ATTORNEY KAREN L. WATKINS: I did not bring an Order for the Court

to sign, Your Honor. Frankly and, and in all candor, I believe that this writ was, or this petition was improvidently granted. I think the issue is significant and important as Judge Brister has outlined. This is not the best case for the Court to adopt a majority rule if it's so inclined or to consider whether the minority rule, as we argue in our briefing, is the better reason to rule that's more protective of all of the interests that the legislature has decided are important to the people of the State of Texas. One of the interesting things about the Ruiz cases, the cases on which Ruiz relied, none of them considered the fiduciary responsibility of the guardian. None of them refer to the guardianship statutes at all and the responsibility of that person. Now the legislature has enacted that, those provisions as well. So that's an expression by the legislature of what's in the public interest for incapacitated persons in this State. I see my time has expired, Your Honor. We would ask that the Court either deem the Petition improvidently granted or affirm the Judgment of the Court of Appeals.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counselor. The Court will hear a rebuttal.

REBUTTAL ARGUMENT OF THOMAS C. WRIGHT ON BEHALF OF PETITIONER

ATTORNEY THOMAS C. WRIGHT: May it please the Court, Tab D to our Brief on the merits is an Agreed Order Appointing Temporary Guardian, agreed to by the parties and dated 22 December 1997 as a specific finding by the Probate Judge, Doris Conte is an incapacitated person. It's on the first page of that Order, paragraph 6. So, despite the statutes and whether there's a presumption of incapacity, there's a specific finding that was never challenged from 1997 and there are, in the accounting records, further distributions or expenditures by Susan Conte that she agreed she owed back to the Trust after 1997. With regard to a Power of Attorney, the Court obviously knows that the Probate Code has a section killing a Power of Attorney when a permanent guardian is appointed and permitting the Trial Court to suspend a Power of Attorney when a temporary guardian is appointed. That's Section 485. With regard to this majority-minority rule, the Court has already chosen and I'd, I'd like to take a minute to talk about three cases. Messenger, I've already talked about. That's the first case. That's the San Antonio writ refused case. In 1940, the North Carolina Supreme Court in a case called Pilot Life, looked at this and discussed the Messenger case and rejected it and said we're going a different way. We're going the minority way. Then comes a district court in New Hampshire, which my opponent cites and quotes extensively from in their brief, a case called Stuart Federal District Court looking at New Hampshire law, finds none, decides to follow Pilot Life. Okay, the dye has been cast. We've already adopted the majority rule. I think we ought to stick with the majority rule. The alteration of this Trust, I'd like to speak a moment about, was what...

JUSTICE SCOTT A. BRISTER: Let me ask you first. Have you waived the argument that no statute of limitations applies?

ATTORNEY THOMAS C. WRIGHT: No, it's in our brief at pages 42 through 48. We talk extensively about how this is a status, which is exactly what, how Your Honor put it and how limitations at least shouldn't apply to this ongoing conflict of interest. Did we ever say never under any circumstances should there be a statute of limitations on this section? I don't think so. I don't need, think we needed to say it that way. There's at least no limitations as applied to our facts.

JUSTICE DALE WAINWRIGHT: And that issue is raised and preserved in the lower Courts?

ATTORNEY THOMAS C. WRIGHT: It was raised the Motion for Rehearing in the Court of Appeals, which this Court said wasn't even necessary in the Williams v. Colliff case and those citations I provided by letter last week to the Court. This Court has said even if the appellee files no brief, the Court of Appeals ought to apply the right limitations. So, yes.

JUSTICE DALE WAINWRIGHT: At trial?

ATTORNEY THOMAS C. WRIGHT: We won at trial. So there was never any and, in fact.

JUSTICE SCOTT A. BRISTER: It didn't apply any limitations?

ATTORNEY THOMAS C. WRIGHT: Right and the trial court didn't apply any limitations. So we didn't need to make any argument to the trial judge about that.

JUSTICE DAVID M. MEDINA: In Justice Hanks' opinion, we have a great deal of respect for, it talks about the limitations issue and perhaps the lawsuit wasn't filed as soon as it could have been filed and, therefore, it's barred. It seems pretty simplistic and pretty easy to follow. Why wasn't this lawsuit filed more timely?

ATTORNEY THOMAS C. WRIGHT: Okay, there's a great answer I was about to get to.

JUSTICE DAVID M. MEDINA: Thank you.

ATTORNEY THOMAS C. WRIGHT: Susan's powers were suspended. Susan's powers were suspended when Paula Miller was appointed successor temporary trustee and her powers were never unsuspended. She wasn't acting as trustee. There was no need to sue to remove somebody who wasn't doing anything. It's only when Paula Miller was about to resign and Susan would have got back into position as a trustee that Louis Ditta brought this suit and that's exactly what he should have done. This stuff about he waited too long. He got the financial part of that determined in the Agreed Judgment that approved the accounting, despite their protestations, even here that no, she didn't take money wrongfully. Well it's in an Agreed Judgment. She owes the money. Louis got the financial part of that taken care of then and when it turned out that Susan Conte was about to come back in as trustee and so, in other words, when it was necessary to file the suit for removal, that's when it was filed and, by the way, that was well within, you know, the limitations period if you measure it from the time of the Judgment or the time that he had the power as permanent guardian to bring suits on Doris Conte's behalf. So, we would ask this Court to apply no limitations to this kind of thing. You know, you really have a choice and you can go both ways, the 16.001, the suit to remove, which way, you know, or maybe both with alternative holdings. I think both are very important. We would ask that you affirm the removal and the modification of this Trust. Otherwise, these folks are going to think they can reappoint trustees that are removed and there'd be another removal action and that doesn't make any sense. It's inefficient. The trial judge had discretion to make that alternation.

MALE: Who are these folks?

ATTORNEY THOMAS C. WRIGHT: I'm sorry?

MALE: Who are these folks? You said these folks?

ATTORNEY THOMAS C. WRIGHT: Well, I'm sorry. Joey and Susan filed in the trial court while this was pending a notice that they were voting to reappoint Susan as a trustee if she was removed. The Trust instrument gives the majority beneficiaries the right to reappoint, but probably it wasn't intended the right to reappoint somebody who's been

Westlaw.

removed for cause by a Probate Court.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Wright. The cause is submitted and the Court will take a brief recess.

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